

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1855

JOHN DANIEL,

Plaintiff-Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
AMICUS CURIAE

HARVEY L. PITT
General Counsel

PAUL GONSON
Associate General Counsel

JACOB H. STILLMAN
Assistant General Counsel

EDWARD A. SCALLET
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

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INTEREST OF THE SECURITIES
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STATEMENT OF ITS POSITION

The Securities and Exchange Commission, the agency which administers the federal securities laws, including the Securities Act of 1933 and the Securities Exchange Act of 1934, submits this brief, amicus curiae, to express its views on the potential application of the antifraud provisions of those Acts to interests in the pension plan involved in this case. The sole issue before this Court, on the present interlocutory appeal from an order refusing to dismiss the securities laws counts of the complaint, is the threshold question of whether the complaint in this private action, as construed most

favorably on behalf of the plaintiff, 1/ states any basis for the application of the federal securities laws antifraud provisions -- provisions of law given content and meaning not only as a result of enforcement by the Commission, but also through enforcement by investors, in their own private actions, which serve as a "necessary supplement" to the Commission's own enforcement activities. 2/ This private action for damages does not raise, nor do we discuss, administration by the Commission of the federal securities laws with respect to pension plans.

The federal securities laws were broadly intended to provide federal protections to any person induced to give value for an investment in which profits are to be derived from the managerial efforts of others. Unlike a tangible commodity, which a prospective purchaser can observe and evaluate, a security derives value from, and subjects the purchaser to the risks of, the unseen future ability of those who manage his investment. For this reason, as the Supreme Court has recognized, securities investors have been accorded special status and protections. 3/ Of prime importance, in this context, are the antifraud provisions of those laws, which assure that investors will not be induced to part with value on the basis of fraudulent conduct, including false or misleading representations. And, it is "irrelevant" that "the transaction is not conducted through a securities exchange or an organized over-the-counter market * * *," 4/ just as it is now well-settled that the purpose of the antifraud provisions "is not 'limited to preserving the integrity of the securities markets' * * *." 5/ It is likewise immaterial that the transaction

1/ See Gardner v. Toilet Goods Ass'n, Inc., 387 U.S. 167, 172 (1967).

2/ Mills v. Electric Auto-Lite Co., 396 U.S. 375, 382 (1970); J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).

3/ See, e.g., Wilko v. Swan, 346 U.S. 427, 435 (1953).

4/ Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 10 (1971).

5/ Id., at 12 (emphasis added).

involves an interest which is subject to other state or federal regulatory laws; if "there was a 'sale' of a security and * * * fraud was used 'in connection with' it, there is redress under [the federal securities laws antifraud provisions] * * *." Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971).

An interest in a pension fund is an investment in which profits are derived by the employee from the efforts of the fund's managers or trustees. Accordingly, the Commission has long recognized that an interest in a pension fund is a security, and the Congress has evidenced its agreement with that position. As in the case of any other investment security, it is essential that, when an interest in a pension fund is sold, protection against fraud be accorded. When an employee decides to purchase a pension fund interest by choosing to give value, in the form of his labor, in exchange for that interest, he should be assured that his decision is not affected by false or misleading representations concerning the pension. To hold otherwise would be an unwarranted denial of the protection accorded to all securities purchasers by the antifraud provisions.

We recognize that an employee's decision to take or keep a job is not, by itself, an investment decision. But, when that decision is materially influenced by the existence of a security — in this case, an interest in a pension fund — which he will purchase with his labor, he is making not only an employment decision but also an investment decision. The Commission's position is that, where an employee's decision to take or keep a job, and thereby acquire an interest in a pension fund, is materially influenced by fraudulent representations concerning the pension, he should be permitted to recover under the antifraud provisions for any harm so caused. By contrast, where an employee's decision to take or retain a job is not, in fact, materially influenced by whatever representations are made concerning the pension, and he is thus making solely an employment decision,

he should not be permitted to recover. That the latter employee will not be able to recover, however, is no basis for withholding relief, as the defendants would do, for the former employee who makes an investment decision.

Nonetheless, we appreciate the deep concern expressed by the defendants, and by the distinguished amici curiae which support their positions, that imposition of the full panoply of federal securities laws regulation upon the field of labor-management relations, including pension plans, would seriously disrupt collective bargaining and the regulatory scheme carefully fashioned by Congress to govern national labor policy. The Commission is not expert in the area of labor-management relations and is hesitant, for that reason, to attempt to predict, or refute predictions of, such disastrous consequences. But these predictions rest in major part on construction of the federal securities laws, an area as to which the Commission has had considerable experience over many years. With all respect to the defendants and the amici, the Commission is of the view that their apprehensions are not well founded and that the two statutory schemes — securities and labor-management relations — complement, rather than collide with, each other in this case.

A fundamentally erroneous assumption pervades the briefs of the defendants and the amici. They appear to confuse the requirements of the Securities Act's registration provisions (which are not involved in this case) with those of the antifraud provisions, which are. The registration provisions, which are commonly referred to as the Securities Act's "disclosure" provisions, to differentiate their function from that of the "antifraud" provisions, are designed to assure that investors will be furnished all material information needed to make an informed investment decision. The mechanism for meeting that objective is the filing with the Commission of a registration statement, and the delivery to investors of a prospectus, containing detailed financial and other informa-

tion about the security and its issuer. The antifraud provisions, by contrast, do not establish a system for affirmative disclosure consisting of the preparation or filing of documents. While they could, under some circumstances, require that a person make affirmative disclosures (which may be oral or written) necessary in order not to mislead a securities purchaser, the antifraud provisions are essentially a generalized prohibition against fraudulent activity.

Thus, this case does not present questions concerning the imposition of the entire panoply of federal securities law regulation, as the briefs seem to assume. Perhaps, if the registration requirements of the Securities Act were sought to be applied, certain difficulties as addressed by the opening briefs could be presented. But Congress, in the securities laws, specifically exempted interests in nearly all pension funds from the registration requirements, and the position urged by the Commission in this antifraud case does not, in any way, suggest the applicability of the registration provisions.

A holding that the antifraud provisions apply to the sale of pension fund interests will not lead to the disasters of which the briefs speak. Such a holding is by no means the end of the case; it is only the beginning. The plaintiff still must establish that a fraud occurred, that he was injured and that his injury was causally related to the fraud. Moreover, not every statement or omission will result in a finding of fraud; the statement or omission must be "material," a word of art given content and meaning by judicial decisions. Perhaps those factors which the defendants and the amici urge should militate against the finding of a security — essentially the labor-management milieu and the existence of the detailed disclosure and reporting provisions of the Employment Retirement Income Security Act of 1974 ("ERISA") — would bear on the materiality of statements and omissions. An equally important consideration to bear in mind is the causation requirement, noted above, that the employee's decision to take or retain the job be materially influenced by fraud concerning the pension program.

The broad purposes of the federal securities laws, which seek to protect persons who purchase investments with the hope of profit to be derived from the efforts of others, are not inconsistent with the goals of ERISA. Nor are the antifraud provisions of the securities laws inconsistent with, or duplicative of, ERISA's provisions. While Congress, in enacting ERISA, provided some very important protections to participants and beneficiaries of pension plans, it did not provide the type of protection available under the antifraud provisions of the securities laws. This fact underlines the appropriateness and the complementary nature of a private action under the antifraud provisions of the securities laws, which actions are well-established in federal jurisprudence. 6/

6/ See, e.g., Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972); Superintendent of Insurance v. Bankers Life and Casualty Co., supra, 404 U.S. at 12.

STATEMENT OF THE CASE

The plaintiff, John Daniel, was a member of Local 705, International Brotherhood of Teamsters ("Local 705") from 1950 until his retirement in 1973. During that period, he worked as a truck driver for employers who were covered under collective bargaining agreements executed with Local 705 (App. 94a-95a). 7/ Pursuant to these agreements, each employer paid to a pension fund, on behalf of Mr. Daniel, a sum specified in the collective bargaining agreement for each week in which he performed any services (App. 72a-21). The pension fund, a trust, was jointly administered by the union and the employers (App. 62a-2). Under the terms of the pension fund trust agreement, an employee was eligible for a pension if he was employed "for at least 20 consecutive, continuous and uninterrupted years immediately preceding retirement" (App. 72a-8).

The basis of counts I and II of the complaint — the counts which are in issue on this appeal — is the plaintiff's claim that the defendants were responsible for misrepresentations and omissions relating, among other things, to the above-mentioned length and continuity requirements of the pension plan. The plaintiff, on behalf of all present and past members of Teamster local unions throughout the country, brought this suit in the United States District Court for the Northern District of Illinois against the trustees of the Local 705 pension plan, Local 705, certain Local 705 officers, the International Brotherhood of Teamsters ("IBT"), and asserted defendant classes (Complaint ¶¶ 4-9, App. 27a-28a). He alleged that the defendants had violated antifraud provisions of the federal securities laws — Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.

7/ "App. _____" refers to pages of the defendants' appendix. "IBT Br. ____" refers to the brief of defendant International Brotherhood of Teamsters; "Local Br. ____" refers to the brief of defendants Local 705, International Brotherhood of Teamsters and Louis F. Peick; "Labor Br. ____" refers to the amicus curiae brief of the Secretary of Labor; "ERIC Br. ____" refers to the amicus curiae brief of the ERISA Regulations Industry Committee; and "NACMP Br. ____" refers to the amicus curiae brief of the National Coordinating Committee for Multiemployer Plans.

78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5 -- in the offer and sale of interests in the Local 705 pension plan. Specifically, the defendants were alleged to have misrepresented the length and continuity requirements of the pension plan; to have omitted material facts concerning those requirements, including the actuarial basis for and likelihood that pension payments would be made to the plaintiff; and to have omitted material facts about diversion of funds from the pension fund for unlawful purposes (App. 32a-33a). The plaintiff further alleged that, as a result of those misrepresentations and omissions, he "purchased and acquired an interest in [the] local Teamster affiliate * * * pension fund by agreeing to provide * * * labor services to employers who [had] labor contracts" with Local 705 (App. 34a).

Although the plaintiff had worked for such employers for 22 1/2 years -- 2 1/2 years in excess of the twenty years required for pension eligibility -- he was thereafter denied his pension on the basis of the pension fund's continuity requirements because of an involuntary three-month lay-off in 1960 and 1961 (App. 31a). Thus, contrary to his expectations, the plaintiff ultimately received no value at all for the money that was paid into the pension fund on his behalf and in compensation for his labor over a 22 1/2 year period. 8/

The defendants moved to dismiss the counts of the complaint based on the securities laws on the ground that the court lacked subject matter jurisdiction of those counts. They argued that interests in pension funds are not "securities" within the definition of that term in the securities laws; that these interests are not "sold" to employees as that term is defined in the securities laws; and that the enactment of specialized legislation dealing

8/ The plaintiff also seeks relief for the defendants' alleged breach of their duty of fair representation under Section 9(a) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 159(a), and for the failure of the pension fund to be established for the "sole and exclusive benefit of the employees," as required by Section 302(c)(5) of the NLRA, 29 U.S.C. 186(c)(5). Finally, the plaintiff seeks to recover under common law theories of breach of fiduciary duty, fraud and deceit. These claims are not in issue on this appeal, and the Commission intimates no view with respect to any of them.

with pensions discloses Congress' intention that the securities laws not apply to interests in pension funds.

In an opinion and order dated March 1, 1976, the district court denied the defendants' motion to dismiss the securities counts. ^{9/} The court reasoned that an interest in a pension fund possesses all of the characteristics that have been identified by the courts as constituting a "security"; that there had been a "sale" of this security within the meaning of the securities laws when the union membership voted on a collective bargaining agreement that included a provision that the employers contribute to the pension fund on behalf of the employees in exchange for their labor or, alternatively, from the continuation of the employee in the employment relationship which required periodic payments by the employer to the pension plan; and that the antifraud provisions of the securities laws were complementary to the specialized pension legislation and therefore there was no indication from the enactment of that specialized legislation that Congress did not intend the antifraud provisions of the securities laws to apply to interests in pension funds.

Pursuant to 28 U.S.C. 1292(b), the district court certified the above order for appeal (App. 178a-179a), and this Court granted the defendants' petition for permission to appeal (App. 191a-192a).

ARGUMENT

Introduction and Background

The resolution of the issues involved in this appeal requires an understanding of the nature of pension funds and their growth as an alternate form of investment medium.

^{9/} The opinion of the district court is reported at 410 F. Supp. 541 and is reproduced at App. 114a-142a.

a. The nature of pension funds generally and of the Local 705 Pension Fund

A pension, broadly defined, is a regular payment, normally for life, to provide retirement income to the recipient upon completion of his working years.^{10/} There are essentially two types of pensions -- "defined contribution" plans and "defined benefit" plans. In a defined contribution plan, an individual account is established for each participant and he receives retirement benefits based upon the amount contributed to his account and any income, expenses, gains and losses thereon as well as any forfeitures of accounts of other participants which may be allocated to his account. ^{11/} All other plans are referred to as "defined benefit" plans. ^{12/} The pension fund at issue in this case is a defined benefit plan in that the plan promises to pay a fixed monthly amount to the employee upon retirement (App. 72a-1).

A pension fund generally is operated in the form of a trust. The reason is that Section 401 of the Internal Revenue Code, 26 U.S.C. 401, requires that an employer must divorce himself completely from the administration of the pension fund in order to receive favorable tax treatment for payments made to the fund. ^{13/} The Local 705 pension fund, a trust established and maintained

^{10/} R. Murray, Economic Aspects of Pensions: A Summary Report 13 (1968 ed.).

^{11/} M. Bernstein, The Future of Private Pensions 8 (1964 ed.) (hereinafter referred to as "Bernstein"). ERISA refers to this type of plan as both a defined contribution and an "individual account" plan. Section 3(34), 29 U.S.C. 1002(34).

^{12/} Bernstein at 9.

^{13/} The Local 705 plan is set up to assure that this separation of the employer and the trust is strictly maintained. Article 14 of the Trust Agreement provides that "[n]o employee shall have any individual right, title, interest, or claim against any employer * * *" (App. 62a-7).

Under Section 403(a) of ERISA, 29 U.S.C. 1103(a), the assets of pension plans must be held in trust by one or more trustees. Section 403(b), 29 U.S.C. 1103(b) however, provides that assets in certain enumerated plans need not be held in trust.

pursuant to Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. 186(c)(5), has a board of trustees composed equally of employer and union representatives (App. 62a-2). These trustees have general supervision of the operation of the trust, including the investment of the trust corpus (App. 62a-3).

The trustees of a pension fund are also responsible for assuring that the fund is actuarially sound so that it will be able to make pension payments to those eligible for them. Although there are many factors which go into the actuarial calculations, ^{14/} one of the most important is the investment performance of the fund. Thus, it has been estimated that for each 1% of investment earnings, benefits can be raised 20%. ^{15/} Indeed, the Local 705 plan has raised the amount of its fixed benefit several times since the inception of the plan (App. 72a-1). As Local 705 explained to its members in 1969 in one of its informational booklets (App. 70a-14):

"Another advantage [of the Local 705 plan] is that the contributions earn income by being invested. Consequently, the money originally contributed grows. Without this income growth the fund could not accumulate enough money to pay the \$250.00 monthly pensions provided by the Plan."

We should distinguish between the two basic methods of funding a pension plan. In "contributory" plans, the employee himself contributes his money directly to the pension fund. In so-called "noncontributory" plans, which,

^{14/} See generally, Melone, Collectively Bargained Multi-Employer Pension Plans 77-85 (1963 ed.).

^{15/} Bernstein at 41. See also, Employee Benefit Plan Review (No. 4) 50 (1954).

for a variety of reasons, outnumber contributory plans quite substantially, the employee contributes indirectly through his labor in return for which his employer makes the monetary contribution to the fund. 16/

There is one other distinction between types of pension plans that is significant for purposes of this appeal. In a so-called "compulsory" plan, the employee chooses to invest in the fund by becoming and remaining an employee, since contributions to the fund in such a plan are made automatically as one of the benefits an employee receives in return for his labor. In a "voluntary" plan, on the other hand, the employee makes a separate decision (independent of his decision to be an employee) whether to participate in the pension plan.

The Local 705 plan is essentially noncontributory and compulsory. Thus, the rules governing the pension plan provide that the employer shall make a contribution "for each employee * * * for any week in which such employee performs any service for the employer" (App. 68a-17). However, the governing rules also provide that, should an employee be laid off, he can make his own contributions to the plan (App. 70a-4). Accordingly, to that extent, the plan is not entirely noncontributory and compulsory.

16/ In 1970, approximately \$12.5 billion was contributed by employers to pension plans, as opposed to \$1.5 billion contributed by employees. H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 10 (1974).

The primary reasons for the dominance of noncontributory plans are tax-related. Employers, within certain limits, are permitted to deduct contributions made to such plans on behalf of covered employees, whether or not the interests of covered employees are vested; and covered employees defer payment of tax on employer contributions made on their behalf until they actually receive the benefits. See generally, Bernstein at 198-200.

b. The rise of the private pension system
as an alternate form of investment medium

Within the last thirty years, there has been a dramatic rise in the importance of pension funds as a medium of investment. We can contrast investments as either direct investment (e.g., purchase of stock in industrial corporations or purchase of real estate) and indirect investment (e.g., placing money in a financial institution such as a bank, mutual fund or pension fund, which in turn makes the direct investment). In the early part of this century, approximately 62% of the money used for investment was invested directly, while 38% was invested indirectly, thus reflecting nearly a 2-1 margin in favor of direct investment. Furthermore, within the category of indirect investment, most of the money went into commercial bank deposits, life insurance and mutual funds, while a negligible amount (1/10 of one percent) was invested in pension funds. 17/

By the end of the 1950's, however, a significant change had occurred in individuals' investment preferences. Thus, in the period from 1953 to 1962, direct investment had fallen to 17% while indirect had jumped to about 83%. Within indirect investment, another major change had occurred. Commercial bank deposits lost ground, life insurance reserves grew slightly, mutual funds grew somewhat more substantially, and pension funds increased from the earlier 1/10 of one percent to 27%. 18/

17/ These statistics are discussed in Hearings before the Subcommittee on Fiscal Policy, U.S. Cong. Joint Economic Committee, 91st Cong., 2d Sess. 17-18 (1970).

18/ Id.

This phenomenon is also apparent in statistics discussed by Congress in its consideration of ERISA. As reflected in the House report, estimates of the number of employees covered by pension plans in 1960 ranged from 23 million to 30 million, compared with coverage of only 4 million in 1940 and 9.8 million in 1950. Between 1950 and 1970, total annual contributions made to pension plans by employees and employers rose from about \$2.1 billion to about \$14 billion. In 1950, 450,000 beneficiaries received \$370 million from retirement plans; in 1960, 4,700,000 beneficiaries received \$7.4 billion in pension payments. ^{19/}

Not surprisingly, there has been a corresponding evolution in the legal concepts applicable to pensions. At one time, pensions were legally considered to be mere gratuities given by the employer to the employee and subject to the former's decision to withdraw the benefit at any time. ^{20/} In 1948, this Court, in the landmark decision of Inland Steel Co. v. National Labor Relations Board, 170 F.2d 247 (1948), certiorari denied, 336 U.S. 960 (1949), signaled the end of this theory by holding that pension funds are a mandatory subject of collective bargaining on the ground that the employee's daily work or longevity constituted legal consideration for the pension interest. Thus, the employee's interest in the pension fund is now recognized as being more than a mere gift.

^{19/} See H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 10-11 (1974).

^{20/} See, B. Aaron, Legal Status of Employee Benefit Rights under Private Pension Plans 7 (1960).

I. AN INTEREST IN A PENSION FUND IS A "SECURITY"
WITHIN THE MEANING OF THE FEDERAL SECURITIES LAWS.

Well-established principles demonstrate that an interest in a pension fund is a security. Such an investment medium falls squarely within the definition of security as that term has been consistently interpreted by the Supreme Court; an interest in a pension fund has always been viewed as a security by the Commission; and Congress, in exempting pension fund interests from the Securities Act's registration provisions but not from the antifraud provisions, has evidenced its agreement with that position.

A. An Interest in a Pension Fund Is an "Investment Contract" as That Term Has Been Interpreted in Numerous Supreme Court Decisions.

The Supreme Court has stated that the federal securities laws, "enacted for the purpose of avoiding frauds," must be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963); accord, Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). The Supreme Court has also refused to permit application of "unrealistic and irrelevant formulae" ^{21/} to preclude a finding that the securities laws apply when "all the evils inherent in the securities transactions which it was the aim in the Securities Act to end" are present. Securities and Exchange Commission v. C. M. Joiner Leasing Corp., 320 U.S. 344, 349 (1943).

^{21/} Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293, 301 (1946).

And, the Court has repeatedly emphasized

"that, in searching for the meaning and scope of the word 'security' in the [Securities Exchange] Act [of 1934], form should be disregarded for substance and the emphasis should be on economic reality."

Tcherepnin v. Knight, supra, 389 U.S. at 336; United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 846 (1975).

"Economic reality," in the case of a pension fund, is that the employee, through his labor, acquires an interest, together with other employees, in a common fund over which he and his fellow employees exercise no direct managerial control, with the hope and expectation that payments made on his behalf into that fund with profits thereon will be returned to him at a later date in the form of a pension. Such an interest constitutes an "investment contract", one of the definitions of the term "security" set forth in the federal securities laws. In discussing the meaning of investment contract in Forman, supra, 421 U.S. at 853, the Supreme Court, relying upon its earlier definition of that term in Securities and Exchange Commission v. W. J. Howey Co., 328 U.S. 293 (1946), stated:

"The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."

This emphasis on economic reality must govern, regardless of "the name appended" to the interest (Forman, supra, 421 U.S. at 849) or the particular legal form the interest takes. Thus, in Securities and Exchange Commission v. C. M. Joiner Leasing Corp., supra, the first Supreme Court case defining the scope of the term "security," an oil promoter had formed a corporation, which acquired oil and gas leaseholds. These leaseholds were then sold to investors throughout the country by the use of literature emphasizing the future return of a profit. The lower courts had refused to enjoin this activity

under the federal securities laws on the ground that, in the words of the court of appeals, it could only "find * * * sales and assignments of legal and legitimate oil and gas leases, i.e., sales of interests in land." Id. at 348. Justice Jackson, writing for the majority, rejected this conclusion that only property rights were involved and held that the interests were investment contracts. He stated (id. at 352):

"Nor can we agree with the court below that defendants' offerings were beyond the scope of the Act because they offered leases and assignments which under Texas law conveyed interests in real estate. In applying acts of this general purpose, the courts have not been guided by the nature of the assets back of a particular document or offering" (citations omitted).

Similarly, in Securities and Exchange Commission v. W. J. Howey Co., supra, where purchasers were offered small amounts of citrus acreage accompanied by a management contract with a subsidiary of the seller, the lower courts had placed undue reliance on the formal context and had thus failed to appreciate the underlying character of the offer, treating the transaction as no more than an ordinary real estate sale with an agreement by the seller to manage the property for the buyer. The Supreme Court, however, reasoned that the purchasers in Howey were basically "laying out [their] money in a way intended to secure income or profit from its employment," 328 U.S. at 298, and that it was "immaterial" that the transaction took the form of a sale of "property." Id. at 301.

In subsequent cases, the Supreme Court found securities to exist in situations where the interests not only bore labels foreign to those traditionally associated with securities, but also were subject to regulation under other statutory schemes. Thus, in Securities and Exchange Commission v. Variable Annuity Life Insurance Co., 359 U.S. 65 (1959) ("VALIC"), the Court was confronted with

the question whether variable annuity contracts being sold by insurance companies were securities. Under a variable annuity contract, the benefit payments made to the purchaser vary with the success of the company's investment policy. The defendants claimed that the contracts were solely "insurance" contracts, and that it would be inconsistent with applicable state insurance regulations and thus with the McCarran-Ferguson Act, 22/ to hold that sellers of these contracts must also comply with the requirements of the securities laws. Notwithstanding the fact that the contracts had elements of insurance, since the benefit payments were made periodically from both principal and income on the basis of actuarial assumptions about the risk of mortality, the Court concluded that the protections of the securities laws were needed because the variable annuity "place[d] all the investment risks on the annuitant" (id. at 71); that is, his return was dependent upon the investment experience of the variable annuity fund.

In Securities and Exchange Commission v. United Benefit Life Insurance Co., 387 U.S. 202 (1967) the Court again considered the question of whether a certain type of annuity contract offered by an insurance company was a security. In that case, the purchaser agreed to make a fixed monthly payment for a number of years before a specified maturity date. The seller of the contract undertook to invest the payments. At maturity, the purchaser could elect to take the cash value of his contract, or he could convert his interest into a fixed annuity. The Court held that the pre-maturity portion of the contract was an investment contract even though the purchaser also received the "security of an insurance annuity." 387 U.S. at 204.

22/ In pertinent part, the Act provides that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance * * *." 15 U.S.C. 1012(b).

In Tcharepnin v. Knight, supra, the Court considered an interest which was subject to regulation under statutes other than the securities laws, and specifically declined to hold that the absence of features traditionally associated with securities precluded the interests there involved from being securities. The case involved withdrawable capital shares in a state-regulated savings and loan association. In holding that the shares were "investment contracts" under the Howey formulation, the Court declined to hold that an interest must be "commonly known as a security" — another term in the definition of security — before it can be considered to be a security, stating (id. at 343):

"This, of course, is contrary to our decision in Joiner where we rejected the respondents' invitation to 'constrict the more general terms substantially to the specific terms which they follow.'"

The defendants in that case also stressed that the capital shares differed from other securities in that their holders had no preemptive rights, they were nonnegotiable, and they carried no rights to inspect the association's books and records. The Supreme Court responded (id. at 343-44):

"The same can be said for the types of interests which we found to be securities in Howey and Joiner * * *. In short, the various factors * * * serve only to distinguish among different types of securities. They do not, standing alone, govern whether a particular instrument is a security under the federal securities laws."

In short, the Supreme Court has refused to allow the form or label of an interest to obscure its underlying economic reality; and, even though the interest is subject to regulation under other laws, it is a security if the purchaser is investing in a common enterprise with the expectation of profits to be derived from the managerial efforts of others. Under that test, the pension fund interests in the present case, like the various interests held to be securities in the past, unquestionably are securities.

In urging that interests in pension funds are not securities, the defendants obscure the fundamental economic reality by the use of various "unrealistic

and irrelevant formulae" (Howey, 328 U.S. at 301). Thus, IBT argues that an employee has only a "contingent expectancy" which is dependent upon his ability to meet the pension plan's eligibility requirements for receiving pension payments (IBT Br. 20-21). The same can be said for the holder of an employee stock option where the exercise right is dependent upon, for example, the employee's remaining in the job for a certain length of time, but there is no dispute that such a contingent expectancy is a security. 23/

Similarly, IBT and Local 705 argue that, because the pension payment to the employee is based on actuarial assumptions and because the payment does not necessarily come from capital appreciation through investment management of the contributions paid into the fund, the interest in the pension fund is not an investment contract (IBT Br. 20-21; Local Br. 15). However, the managerial efforts which are an essential element of an investment contract need not, as defendants' arguments assume, consist solely of managing other investments. The profits returned to the investor can result from management of any type of enterprise, including, as the Supreme Court has recognized, citrus acreage and oil and gas properties. See Howey and Joiner, supra. In the case of a pension fund, the managerial efforts include making actuarial assumptions and collecting the pension contributions from the employer. Moreover, the contributions made to the fund on behalf of the employees are at the risk of the fund's management. 24/ In any event, it is clear that the amount available for

23/ The definitions of "security" in the Securities Act and the Securities Exchange Act include any "warrant or right to subscribe to or purchase" any security. See, Section 2(1) of the Securities Act, 15 U.S.C. 77b(1); Section 3(a)(10) of the Securities Exchange Act, 15 U.S.C. 78c(a)(10).

24/ See, El Khadem v. Equity Securities Corp., 494 F.2d 1224 (C.A. 9), certiorari denied, 419 U.S. 900 (1974).

the payment of pension benefits is affected by the efforts of the fund's trustees in managing the fund's investments and by the resulting investment performance of the fund, as Local 705 has itself expressly acknowledged (see p. 11, supra). 25/ Finally, the defendants' attempt to attribute significance to the fact that payments are made on the basis of actuarial assumptions and not solely on the basis of investment performance is answered by the Supreme Court's decision in VALIC, since variable annuity benefits are likewise based on actuarial assumptions. VALIC, 359 U.S. at 70) (see p. 18, supra). 26/

The defendants place their greatest reliance on the Forman case. In so doing, however, they fail to consider that case in the context of the five previous decisions of the Supreme Court discussed previously, and the result is a misreading and misinterpretation of Forman. The Forman decision is in no way inconsistent with the principles enunciated in the previous decisions which support the conclusion that interests in pension funds are securities. Indeed, the Court in Forman noted, "we do not write on a clear slate," and proceeded to apply what it characterized as "well-settled principles [previously] enunciated by this Court * * * ." 421 U.S. at 848.

25/ A similar misconception underlies IBT's claim (IBT Br. 20-21, n. 19) that no security is involved because the employee's investment is subject not only to the risk of lack of investment success, but also to the risk that there will be a sharp reduction of employment or that contributing employers will become insolvent. But, that is merely a truism, applying to every business enterprise, large or small, which may suffer adverse economic circumstances or even become bankrupt from causes wholly outside the control of management. Thus, the investor in Howey was subject to the risk that poor weather would diminish the value of his investment.

26/ Also without merit is Local 705's assertion that it is significant that an employee receives no document evidencing his investment (Local Br. 24). It is clear that the existence of a security is not dependent upon the issuance of a document. See, H.R. Rep. No. 1838, 73d Cong., 2d Sess. 39 (1934); Securities and Exchange Commission v. Addison, 194 F. Supp. 709 (N.D. Tex., 1961); 1 L. Loss, Securities Regulation 458 (2d ed. 1961).

In Forman, the Supreme Court reversed the decision of the Court of Appeals for the Second Circuit and held that interests in a cooperative housing association were not securities. The lower court had relied on two alternate theories -- that the interests were denominated "stock" and that the interests met the definition of "investment contract". The Supreme Court first rejected the literal approach of the former alternative. Viewing the securities laws as being primarily oriented toward transactions that are economic in character, the Court reaffirmed its earlier decisions to the effect that Congress "intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto." Id. at 849. The Court then concluded that the interests in the cooperative were not "stock" because "they lack what the Court in Tcherepnin deemed the most common feature of stock: the right to receive 'dividends contingent upon an apportionment of profits.' 289 U.S., at 339." 421 U.S. at 851.

Turning to the second alternative used by the court of appeals, the "investment contract" theory, the Supreme Court relied on the Howey formulation, stating (id. at 852):

"[T]he basic test for distinguishing the [securities] transaction from other commercial dealings is 'whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.' Howey, 328 U.S. at 301."

The Court continued (id. at 852-853):

"This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial

efforts of others. By profits, the Court has meant either capital appreciation resulting from the development of the initial investment, as in Joiner, supra (sale of oil leases conditioned on promoters' agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds, as in Tcherepnin v. Knight, supra (dividends on the investment based on savings and loan association's profits). In such cases the investor is 'attracted solely by the prospects of a return' on his investment. Howey, supra, at 300. By contrast, when a purchaser is motivated by a desire to use or consume the item purchased — 'to occupy the land or to develop it themselves,' as the Howey Court put it, ibid. — the securities laws do not apply. See also Joiner, supra."

The Court then rejected the conclusion of the court of appeals that "profits" were expected by purchasers of the cooperative interests. First, it rejected "summarily", as types of securities profits, benefits to cooperative purchasers consisting of favorable tax consequences and low rental charges. The Court did discuss the possibility that "profit" could be found in the fact that net income derived from the leasing of space for commercial facilities was to be used to reduce rental costs. However, it found (421 U.S. at 856-857):

"The short of the matter is that the stores and services in question were established not as a means of returning profits to tenants, but for the purpose of making essential services available for the residents of this enormous complex."

Consequently, having been unable to find that any "profit" could be expected by the purchaser of the cooperative stock, the Court was forced to conclude that no security was involved. As the Court concluded (id. at 858):

"What distinguishes a security transaction — and what is absent here — is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use."

In relying on Forman, IBT refers (IBT Br. 16) to the statement in that case that the "primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market," thereby implying

that, since pension interests are not traded in the securities markets, they should not be considered securities. But this language from Forman did not appear in that part of the opinion discussing whether there was an "investment contract", the term involved here. The language was used only in connection with the question of whether the shares of the cooperative, which were denominated "stock", were securities because the definition of "security" includes the term "stock". In determining whether the "stock" of the cooperative was the type of "stock" which Congress contemplated, the Court appears to have considered it significant that the cooperative stock was not traded in the securities markets. Such a limitation, however, has never been considered applicable to the investment contract portion of the definition of security. Thus, in at least four of the five preceding Supreme Court cases, the interests held to be investment contracts, and therefore securities, were not traded on a market. Furthermore, in Tcherepnin, supra, 389 U.S. at 345, the Court took exception to the reasoning of the court of appeals, which, in holding that the withdrawable shares were not securities, had noted that the securities laws "were passed in the aftermath of the great economic disaster of 1929." The court of appeals had therefore concluded that the securities laws were intended to deal only with "speculation in securities which had a fluctuating value and which were traded in securities exchanges or in over-the-counter markets." The Supreme Court responded (id.):

"This statement suggests, and the respondents have argued in this Court, that the petitioners' withdrawable capital shares are not within the purview of the 1934 Act because their value normally does not fluctuate and because they are normally not traded in securities exchanges or over-the-counter. The accuracy of this assertion is open to question. But, more important, it is irrelevant to the question before us. As was observed in Howey, 'it is immaterial whether the enterprise is speculative or nonspeculative.' 328 U.S. at 301." (footnote omitted).

The defendants similarly refer (IBT Br. 21; Local Br. 24) to other language used by the Court in Forman only in its discussion of the term "stock" -- the Court's statement (421 U.S. at 851) that the housing cooperative shares involved there had "none of the characteristics 'that in our commercial world fall within the ordinary concept of a security.' H.R. Rep. No 85, [73d Cong., 1st Sess.] 11 [(1934)]." But neither did the citrus acreage, 27/ chinchillas, 28/ Scotch whisky 29/ or numerous other property interests 30/ which have been held to involve investment contracts.

Defendant IBT further notes that the Supreme Court in Forman pointed to the fact that the purchasers of the housing cooperative shares were interested in obtaining housing, and it concludes that "[e]ven as the shareholders in Forman decided basically whether they wanted to live in a particular place, so the employee's decision here is whether he wished to work for a particular employer" (IBT Br. 18). IBT fails to recognize, however, that the purchaser in Forman was acquiring only housing -- an interest which, as the Supreme Court emphasized, was not an investment for profits to be

27/ Howey, supra.

28/ Miller v. Central Chinchilla Group, Inc., 494 F.2d 414 (C.A. 8, 1974).

29/ Glen-Arden Commodities, Inc. v. Costantino, 493 F.2d 1027 (C.A. 2, 1974).

30/ See, Ahrens v. American-Canadian Beaver Co., 428 F.2d 926 (C.A. 10, 1970); Securities and Exchange Commission v. MacElvain, 417 F.2d 1134 (C.A. 5, 1969), certiorari denied, 397 U.S. 972 (1970) (interest in a lawsuit); Continental Marketing Corp. v. Securities and Exchange Commission, 387 F.2d 466 (C.A. 10, 1967), certiorari denied, 391 U.S. 905 (1968) (beavers); Roe v. United States, 287 F.2d 435 (C.A. 5), certiorari denied, 368 U.S. 824 (1961) (oil leases); Blackwell v Bentson, 203 F.2d 690 (C.A. 5, 1953) (citrus groves); Lemmerth v. Mendenhall, 234 F. Supp. 59 (N.D. Ohio, 1964) (archery range); Securities and Exchange Commission v. Payne, 35 F. Supp. 873 (S.D.N.Y., 1940) (foxes); Securities and Exchange Commission v. Gilbert, 29 F. Supp. 654 (S.D. Ohio, 1939) (motor boats).

derived from the efforts of others (see p. 23, supra). It was this lack of profit which was the critical factor in the Court's decision. By contrast, the employee who acquires an interest in a pension fund is obtaining, in addition to employment, an investment in a common fund with the expectation of profit -- a security.

The underlying investment character of a security is not destroyed simply because a purchaser of that interest may be acting with more than one motive. This is demonstrated by the Supreme Court's decisions in Forman, VALIC and United Benefit. Thus, in Forman the Court recognized that a different case would have been presented if there had been an offer of "both a commodity or real estate for use and an expectation of profits," 421 U.S. at 853, n. 17 (emphasis added) -- a situation where the purchaser could have been interested both in ~~housing~~ and in a securities investment. Similarly in VALIC, the purchaser of the variable annuity was interested both in the insurance element of benefit payments for life and in the securities element of payments dependent upon the investment performance of the variable annuity fund (see p. 18, supra). Finally, in United Benefit, the Court was confronted with an argument that the insurance context of the annuity contract precluded the applicability of the securities laws to the security part of the contract (see p. 18, supra). In rejecting this argument, the Court stated (387 U.S. at 207):

"[W]e do not agree with the Court of Appeals that the contract must be characterized in its entirety. Two entirely distinct promises are included in the contract and their operation is separated at a fixed point in time."

The same is true here: the employee furnishes his labor in exchange for promises to pay wages during his working years and, by reason of the employer's payments into an investment fund on his behalf, pension payments after his retirement.

B. The Commission Has Consistently Taken the Position
that Interests in Pension Funds Are Securities.

From the beginning, Congress has intended through the securities laws to protect from fraudulent conduct those persons who rely on the managerial efforts of others to return profits to them at a later date. In 1922, the House Report on one of the precursors of the securities laws described the kind of people the laws were intended to protect:

"[The] victims [of securities fraud] are usually men and women of small means and little business experience and who have no means of judging the value of a security." 31/

Twelve years later, a House committee discussed the necessity of protecting the investor who is forced to choose between competing forms of investment enterprises:

"As a complex society so diffuses and differentiates the financial interests of the ordinary citizen that he has to trust others and cannot personally watch the managers of all his interests as one horse trader watches another, it becomes a condition of the very stability of that society that its rules of law and business practice recognize and protect that ordinary citizen's dependent position." 32/

The response of that Congress was to enact broad-ranging legislation designed, among other things, to protect investors against fraudulent conduct.

It is not surprising that the Commission, the government agency charged with the responsibility of protecting those investors, soon recognized that

31/ H.R. Rep. No. 760, 67th Cong., 2d Sess. 2 (1922).

32/ H.R. Rep. No. 1383, 73d Cong., 2d Sess. 5 (1934).

the beneficiaries of pension plans were within the class of persons intended to be protected by the securities laws, since a pension fund is simply another investment vehicle through which funds of individuals are managed. Commissioner Purcell, testifying before Congress in 1941, 33/ made this point clearly:

"Now, any plan under which employees are given the opportunity to place part of their earnings in a fund which is to be invested for their benefit and returned to them at a later date involves the offering of an 'investment contract.' In fact, many employee plans are in the nature of investment trusts and are indistinguishable in legal effect from investment companies offering securities to the public at large. The Congress in the Investment Company Act of 1940 recognized this fact by providing certain limited exemptions from the provisions of that act for 'employees' securities companies' in sections 3(c)(13) and 6(b)." 34/

33/ Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 887-920 ("1941 Hearings").

34/ 1941 Hearings at 895. Section 3(c)(13) is now Section 3(c)(11) of the Act, 15 U.S.C. 80a-3(c)(11).

Commissioner Purcell also cited some legislative history of the Securities Exchange Act in support of the Commission's position that interests in pension funds are securities. He stated (1941 Hearings at 895-896):

"You may remember that among the proposals for amending the Securities Act which were advanced in 1934 there was one which would have exempted from registration — and I quote from the proposed amendment —

'an offering made solely to employees of an issuer or its affiliates in connection with a bona fide plan for the payment of extra compensation or stock-investment plan for the exclusive benefit of such employees.'

"My recollection, so far as that amendment is concerned, is that it was adopted in the Senate and went to conference. The proposal was eliminated by the conference committee, and the report of the managers on the part of the House assigned the following reasons for its elimination — and I quote from House Report No. 1838, Seventy-third Congress, second session, page 41:

(footnote continued)

The Commission has articulated on other occasions its position that interests in pension funds are securities. Thus, in its Institutional Investor Study in 1971, the Commission stated that "interests of participants in [pension] plans meet the definition of 'security' under the Securities Act of 1933." 35/ This statement was introduced into the record by Manuel Cohen, after serving as Chairman of the Commission, when he testified before the Senate Labor Committee which was considering the bill that eventually became ERISA. He also stated:

"Pension plans represent an investment medium. Interests in a private pension plan fall within the definition of a security under the Securities Act of 1933, and most private pension plans would be subject to regulation under the Investment Company Act of 1940 but for a specific exemption from that statute." 36/

34/ (Footnote continued):

'The conferees eliminated the third proposed amendment to this subsection on the ground that the participants in employees' stock-investment plans may be in as great need of the protection afforded by availability of information concerning the issuer for which they work as are most other members of the public.'

"With this clear statement of Congress before it, the Commission certainly had no alternative but to interpret the act as applying to employees' plans which involve the sale of a security."

The defendants and the amici have relied on comments by Congressman Wolverton, a member of the House committee before which Commissioner Purcell was testifying, to the effect that he did not believe that Congress intended to regulate pensions under the securities laws (IBT Br. 31; ERIC Br. 8). Although the Congress in 1934 may not have had pension funds specifically in mind — and the quotation from the legislative history above indicates that it did, at least, have some forms of employee securities plans in mind — it did draft a definition of "security" broadly enough that it could encompass every investment vehicle whereby persons are induced to entrust their money to others with the expectation of profits to be derived from the managerial efforts of others.

35/ Institutional Investor Study, Report of the Securities and Exchange Commission, Summary Volume at 69 (1971).

36/ Hearings on S. 3598 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 231 (1972).

C. Congress Has Recognized that Interests in Pension Funds Are Securities by Exempting Virtually All Pension Interests from the Registration Requirements of the Securities Act, But Not from the Antifraud Provisions of that Act and the Securities Exchange Act.

Congress has evidenced its agreement with the Commission's position that interests in pension funds are securities. As explained more fully later (see pp. 35 to 37, infra), the Commission, although recognizing that interests in pension funds are securities, has long taken the position that, under certain circumstances, they are not subject to the registration provisions of the Securities Act. In codifying this "long established administrative practice of the Commission," 37/ Congress in 1970 exempted interests in pension funds from the Securities Act's registration provisions but not from coverage under the antifraud provisions.

This exemption was enacted as an amendment to Section 3(a)(2) of the Securities Act, 5 U.S.C. 77c(a)(2). 38/ The exemptions contained in Section 3, however, are expressly made inapplicable to the Act's antifraud provisions contained in Section 17. Thus, Section 17(c) provides: "The exemptions provided in Section 3 shall not apply to the provisions of this section"; and the House and Senate committees, in considering the 1970 legislation, specifically stated:

37/ H.R. Rep. No. 91-1631, 91st Cong., 2d Sess. 31 (1970) ("Conference Report").

38/ Section 3(a)(2) currently provides, in pertinent part, an exemption for

"any interest or participation in a single or collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension, or profit sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954, or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code, other than any plan described in clause (A) or (B) of this paragraph (i) the contributions under which are held in a single trust fund maintained by a bank or in a separate account maintained by an insurance company for a single employer and under

(footnote continued)

"As with other securities exempted under section 3 of the act, the amendment would not exempt the securities from the antifraud provisions of section 17." 39/

Amici ERIC and NCCMP have attempted to downplay the significance of this Congressional action by asserting that the 1970 exemption related only to the sale to pension funds of interests in certain bank collective trust funds and insurance company separate accounts, and not to the sale to employees of interests in the underlying pension fund (ERIC Br. 8-9, n. 3; NCCMP Br. 16-19). These amici, however, in referring to the exemption in this way, have described and set out in their briefs not the exemption as enacted, but rather an earlier version which referred only to "collective" trust funds. As a result of changes in the exemption occurring during the legislative process, the exemption as finally enacted applies not only to the interests in the bank's collective fund, but also to the interests sold to employees in the underlying pension fund.

Since the legislative process was complex, it is necessary to set out the relevant events in detail.

In 1970, Congress enacted a series of amendments to the Investment Company Act of 1940. It also made several changes in the Securities Act and the Securities Exchange Act, the most important of which for the purpose of this case was the amendment to Section 3(a)(2) of the Securities Act re-

38/ (footnote continued):

which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the employer or by any company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code."

39/ H.R. Rep. No. 91-1382, 91st Cong., 2d Sess. 43 (1970); S. Comm. on Banking and Currency, Analysis of S. 34, 91st Cong., 1st Sess. 15 (1969) ("Analysis of S. 34").

ferred to above. The principal stimulus for this amendment, as ERIC and NCCMP correctly point out, was to clarify the status of certain commingled investment accounts maintained by banks and insurance companies. 40/ Accordingly, early versions of the bill exempted only

"any interest or participation in a collective trust fund maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with * * * a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954" (emphasis added). 41/

After passage by the Senate of a bill containing this provision, the General Counsel for Sperry Rand Corporation wrote a letter to the House subcommittee considering the legislation, noting that the bill did not exempt interests in single trust funds. 42/ He suggested that the bill be amended to provide that interests in such funds also be exempt, by inserting in the exemption the language "or any employees' stock bonus, pension or profit-sharing trust" after "separate account maintained by an insurance company."

When the bill was reported out of the House committee, a significant change had been made in response to the request by Sperry Rand. Instead of the language suggested by Sperry Rand, however, the committee added the phrase "single or" to precede the phrase "collective trust fund maintained

40/ Banks maintaining these collective funds would solicit money from various institutional investment vehicles, including pension funds, and would promise to commingle the funds to take advantage of the economies of size that could be gained in the securities market and the investment expertise of the bank's analysts. Since an interest in such collective funds held by an individual pension fund is a security and the bank collective fund an investment company, efforts were made to exempt this security from the registration provisions of the Securities Act and the collective fund from the Investment Company Act.

41/ See, e.g., S. 34, 91st Cong., 1st Sess. 65 (1969), reprinted in Analysis of S. 34, supra, note 39, at 119.

42/ See Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess., Part 2 at 929-931 (1969).

by a bank." Thus, the bill, as reported by the Committee and later passed by the House, exempted both single and collective trust funds, thereby changing the focus of the exemption to encompass interests in the underlying pension funds as well as the participations in bank collective funds. The Conference committee went along with the House version, stating in its report (Conference Report at 31):

"The Senate bill exempted from the registration requirements of the 1933 Act certain collective trust funds maintained by a bank or in a separate account maintained by an insurance company.

"The House amendment would have codified a long established administrative practice of the Commission by making it clear that this exemption applied not only to collective trust funds, but also to single trust funds.

"The conference agreement follows the House version."

Two subsequent changes in the language of the exemption further reflect the change in the focus of the exemption to cover not only interests in collective funds, but also interests in the individual employer's pension fund. Thus, although the Conference committee agreed with the House to exempt both single and collective funds, it modified the House provision in one respect. Since that provision exempted interests in all pension funds, it was contrary to the Commission's longstanding position that non-registration of pension interests did not apply in all situations. Specifically, the Commission had required registration where an amount in excess of the employer's contribution to a pension fund is allocated to the purchase by the fund of securities issued by the employer. In order to conform the exemption to the Commission's prior practice, a provision was added in conference excluding the above situation from the exemption. 43/

43/ See Conference Report at 24.

However, the addition of this exclusion created yet another problem, which was remedied in separate legislation adopted a week after the passage by Congress of the conference bill. As noted, the exclusion applied whenever an amount in excess of the employer's contribution was used to purchase securities issued by the employer. Since interests in pension funds are themselves securities, the exclusion might have been interpreted to subject to registration all pension plans where any money is contributed to the pension fund directly by employees. In such plans, it could be argued that this money is purchasing securities of the employer — the pension interests. 44/ Accordingly, Section 3(a)(2) was amended again to make it clear that the term "security issued by the employer" as used in the exemption did not include the securities consisting of the interests in the pension fund. 45/

In sum, the history of the 1970 amendments shows that Congress intended to conform the statute with the Commission's administrative view that, although registration was not necessary in most cases, interests in pension funds are indeed securities.

II. A SALE OF A SECURITY OCCURS WHENEVER AN EMPLOYEE TAKES ACTION WHICH RESULTS IN HIS GIVING VALUE IN EXCHANGE FOR AN INTEREST IN A PENSION FUND; AND WHERE HIS ACTION WAS MATERIALLY INFLUENCED BY FRAUDULENT REPRESENTATIONS CONCERNING THE PENSION, HE SHOULD BE PERMITTED TO RECOVER UNDER THE ANTIFRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS.

The applicability of the antifraud provisions depends not only on there being a security, but also on there being a sale (or an offer to sell). The term "sale" is defined in Section 2(3) of the Securities Act as including

"every * * * disposition of a security or interest in a security, for value."

44/ In particular, there was concern that where an insurance company maintained a separate account to fund pension benefits for its own employees, interests in such an account might be considered securities issued by the employer.

45/ See, 116 Cong. Rec. S40608 (Dec. 9, 1970), for a discussion of this final change.

The term is defined in Section 3(a)(14) of the Securities Exchange Act as including "any contract to sell or otherwise dispose of."

There appears to be no dispute that a sale occurs when an employee acquires an interest in a pension plan that is both contributory and voluntary, since the employee makes a separate decision to pay money directly into the pension fund. However, the Commission, in its early days, reached a different result for purposes of the Securities Act's registration provisions in the case of plans that are either noncontributory or compulsory. It was reasoned that there was no sale of an interest in a noncontributory plan because there was no direct investment of money by the employee; consistent with the then prevailing legal understanding, the employer's contributions were considered to be gifts. Similarly, it was reasoned that no sale was made in a compulsory plan. Although it was recognized that the individual had a choice whether to become or remain an employee, it was thought that that choice could never be affected by representations concerning the pension plan.

This Court, many years later, in this case involving a compulsory and non-contributory pension plan, is now presented with the question of whether the foregoing "no-sale" rationale should be extended to the antifraud provisions. The Commission believes, as did the district court, that the "no-sale" rationale should not be so extended.

A. The "No-Sale" Rationale Has Been Applied Only to the Registration Provisions.

In 1941, Commissioner Purcell explained to Congress the basis of the Commission's "no-sale" rationale and its applicability to the Securities Act registration of interests in pension funds (1941 Hearings at 896-897):

"[E]ven where the [pension] plan involves securities, registration is not required in the many cases where the employees pay nothing for the securities, but receive an interest in an investment fund by way of bonus from their employer; for, of course, a gift is not a sale, and the Securities Act is concerned only with sales of securities.

"Similarly, compulsory plans do not require registration. If a plan is so set up that participation in it is a condition of employment, the Commission has taken the position that, as in the case of a noncontributory or bonus plan, there is no sale involved. The purpose of the registration provisions of the Securities Act is to disclose to prospective investors the essential facts about securities which they are asked to buy, and if the employees are given no choice as to whether to buy or refuse to buy there hardly seems any point in the registration process. As a practical matter, people do not decide, it seems to me, to take jobs or leave them because they like or dislike the company's investment plan" (emphasis added). 46/

It is clear from all of the subsequent discussions of the "no-sale" rationale by the Commission and its staff that the theory was developed and has been applied only in the context of registration. Thus, in a 1941 opinion letter, an Assistant General Counsel of the Commission stated:

"As to the question of finding a 'sale' within the meaning of Section 2(3) of the [Securities] Act, wherever a plan involves an investment contract or a certificate of interest or participation in a profit-sharing agreement and the employees have a choice whether or not to make contributions, there is obviously an 'attempt or offer to dispose of * * * a security * * * for value.' On the other hand, it is because of the language of Section 2(3) that no 'offer' or 'sale' is involved in the case of a noncontributory plan, where the employees are not requested to make contributions, or in the case of a compulsory plan, where there is no element of volition on the part of employees whether or not to participate and make contributions. Thus, there are both the presence of a 'security' and the presence of a 'sale' in those cases in which the Commission considers that registration of interests in employees' plans is required" (emphasis added). 47/

In 1967, when Congress was considering an amendment to exempt certain pensions from registration, Commission Chairman Cohen testified:

"The application of the Securities Act of 1933 to pension and welfare plans has presented difficulties over the years. Such plans could be regarded as involving the public offering of securities requiring registration. On the other hand, the special characteristics of these plans and the fact that they are

46/ This paragraph from Commissioner Purcell's testimony is misquoted in the brief of defendant IBT (IBT Br. 30). As set forth in that brief, the paragraph fails to contain the first of the two references to the registration provisions.

47/ 1 CCH Fed. Sec. L. Rep. ¶2105.53.

often an integral part of labor relations, often determined by collective bargaining, has presented difficulties and in general the Commission has not heretofore required registration of such plans under the Securities Act of 1933, except where such plans are funded by investment in the employer's securities" (emphasis added). 48/

48/ Hearings on Amendment No. 438 to S.1659 Before the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., pt. 3, at 1326 (1967).

IBT and NCCMP attempt to show, through quotations from various Congressional materials, that Congress viewed the "no-sale" rationale as being applicable to the securities laws generally, and not just to the registration provisions (IBT Br. 32-35; NCCMP Br. 6-15). But a fair reading of these materials, in light of the type of labor-management and pension legislation that the Congress was considering at those times, and in light of the significantly different nature and much more limited scope of the antifraud provisions, shows that Congress was not suggesting, as IBT and NCCMP contend, that interests in pension funds are not subject to the antifraud provisions. The legislation which Congress was considering involved, among other things, detailed and complex regulation of pension funds through the prescribing of duties and responsibilities in the day-to-day operation of pension funds, requirements for the filing of disclosure documents with a government agency, and the delegation to the agency of authority to adopt detailed rules and regulations with respect to pension funds. When the Congressional committees and their staffs commented on the absence at that time of adequate federal legislation, they were, of course, referring to the absence of the type of legislation that they were contemplating. The Commission does administer legislation of that type -- the Investment Company Act, which imposes broad regulatory control over the operation of investment companies, and the registration provisions of the Securities Act, which require the filing with the Commission of a disclosure statement, and the delivery to the investor of a prospectus, containing detailed financial and other information. However, most pension funds were expressly exempted from the former act (see Section 3(c)(11), 15 U.S.C. 80a-3(c)(11)) and, by virtue of the "no-sale" rationale, were not subject to the latter act's registration requirements. Presumably, it was the inapplicability of legislation similar to this to which the Congressional materials were referring when they commented upon the absence of appropriate Federal legislation; they were not referring to the far different type of requirements imposed by the securities laws' antifraud provisions, which are essentially a prohibition upon fraudulent activity, and do not require the filing of any document or establish control over operations. That the authors of the Congressional materials did not have in mind legislation such as the antifraud provisions is reflected in their use of such terms, in referring to the absence of legislation, as "disclosure" requirements (see IBT Br. 34; NCCMP Br. 6, 9), "reporting" requirements (see IBT Br. 34), "supervisory jurisdiction" (see NCCMP Br. 11), regulatory "control" (id.), and "supervision over * * * administration and operations" (id.).

B. The "No-sale" Rationale Rests on a Very Narrow View of the Meaning of "Sale", Particularly in Light of the Evolution in the Economic Significance and Legal Understanding of Pensions, and It Should Not Be Extended to the Antifraud Provisions.

In considering whether the "no-sale" rationale should be extended to the antifraud provisions, it is important to note that both the Securities Act and the Securities Exchange Act contemplate that the terms defined in those statutes, including the term "sale," need not be construed the same for all purposes. Indeed, the appropriateness of treating a transaction as involving a sale for purposes of the antifraud provisions but not for purposes of registration was recognized by the Supreme Court in Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453 (1969). The Court there held that a corporate merger involved a sale for purposes of the antifraud provisions of Section 10(b) of the Securities Exchange Act and Rule 10b-5, notwithstanding the existence of a Commission rule providing that, for purposes of the Securities Act's registration provisions, such a transaction did not involve a sale. ^{49/} The Court stated (*id.* at 466):

"Although the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen, ordinary rules of statutory construction still apply. The meaning of particular phrases must be determined in context, SEC v. C. M. Joiner Leasing Corp., 320 U. S. 344, 350-351 (1943). Congress itself has cautioned that the same words may take on a different coloration in different sections of the securities laws; both the 1933 and the 1934 Acts preface their lists of general definitions with the phrase 'unless the context otherwise requires.' 1933 Act, §2, 48 Stat. 74, 15 U. S. C. §77b; 1934 Act, §3, 48 Stat. 882, 15 U.S.C. § 78c. We must therefore address ourselves to the meaning of the words 'purchase or sale' in the context of § 10(b). Whatever these or similar words may mean in the numerous other contexts in which they appear in the securities laws, only this one narrow question is presented here." ^{50/}

^{49/} The Commission rule, Rule 133 under the Securities Act, was subsequently rescinded and replaced by Rule 145, 17 CFR 230.145, which provides for the applicability of the registration provisions to mergers and certain other business combinations.

^{50/} See also, The Exchange National Bank of Chicago v. Touche Ross & Co., [Current Vol.] CCH Fed. Sec. L. Rep. ¶95,614 (C.A. 2, 1976), where the court stated (*id.* at p. 90,064):

(footnote continued)

This case, like National Securities, presents the question of whether a no-sale theory, the applicability of which has been confined to the registration provisions, should be extended for purposes of the antifraud provisions. The "no-sale" rationale with respect to pensions rests on a very narrow view of the meaning of "sale," which is defined as including any "disposition of a security for value" (see p. 34, supra). An employee, even in the case of a compulsory, noncontributory plan, acquires his interest in the pension fund as a result of his voluntary decision to provide value -- his labor -- in exchange for the interest. Such a transaction falls within the plain meaning of the statutory definition. 51/ It may well be justifiable, however, to adopt a narrow construction of "sale" and thereby exclude this transaction from that term for purposes of registration, where a contrary interpretation would lead to the possibly inappropriate or unnecessary application of the registration requirements. No such consideration is involved in the question of the applicability of the antifraud provisions, which are essentially a prohibition upon fraudulent activity, including the making of false or misleading representations. 52/

50/ (footnote continued)

"[T]he purposes of the registration and anti-fraud provisions differ, thus altering the 'context' to be examined to determine whether the admonition 'unless the context otherwise requires' is to be applied."

51/ See, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975), where Justice Powell stated in his concurring opinion:

"The starting point in every case involving construction of a statute is the language itself * * *. Before a court properly could consider taking * * * liberty with statutory language there should be, at least, unmistakable support in the history and structure of the legislation."

52/ See Mundheim and Henderson, "Applicability of the Federal Securities Laws to Pension & Profit-sharing Plans", 29 Law and Contemp. Prob. 795 (1964), where it is pointed out (id. at 814):

"Since [the] antifraud provisions do not impose an undue burden on anyone, there is no reason why they should not remain as remedies available to employees for use in cases where fraud of the kind covered by these sections has been committed."

These provisions afford particularly valuable protection for purchasers of interests in pension funds, who are not likely to be sophisticated and knowledgeable investors and who are offered this complex investment in an atmosphere where there may well be a temptation to over-promote the investment. As one pension industry spokesman has testified:

"The magnitude of the investment employers make in pension benefits for employees, encourages the tendency to present the plan in the most positive terms possible so that a return in positive employee attitudes can be realized on the investment. This leads to over simplification and an advertising sales approach. When, as is so often the case, the communication material is prepared by persons not thoroughly cognizant of the technical and legal nature of plan provisions, the result can easily become a document subject to criticism as incomplete and misleading." 53/

Accordingly, the narrow construction of the term "sale" underlying the "no-sale" rationale is not warranted for purposes of the antifraud provisions. As this Court emphasized in a decision holding that the no-sale theory relating to mergers does not apply for purposes of the antifraud provisions:

"'[P]urchase' and 'sale' are not limited to transactions ordinarily governed by the commercial law of sales. The purpose is evidently to make control of securities transactions reasonably complete and effective to accomplish the purposes of the legislation."

Dasho v. Susquehanna Corp., 380 F.2d 262, 266 (1967). 54/

53/ Testimony of Ernest Griffes on behalf of the American Society for Personnel Administration, Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 765 (1973).

54/ Similarly, other courts have emphasized that the definition of "sale" must be construed liberally for purposes of the antifraud provisions. See, Coffee v. Permian Corp., 434 F.2d 383, 385 (C.A. 5, 1970); Knauff v. Utah Construction & Mining Co., 408 F.2d 958, 961 (C.A. 10, 1969); Lawrence v. Securities and Exchange Commission, 398 F.2d 276, 280 (C.A. 1, 1968); Vine v. Beneficial Finance Co., 374 F.2d 627, 634 (C.A. 2, 1967); United States v. Robertson, 181 F. Supp. 158, 162 (S.D.N.Y., 1959).

The inappropriateness of extending the "no-sale" rationale to the anti-fraud provisions is reinforced by the evolution in the economic significance and legal understanding of pensions. The tremendous growth in the importance of pensions and the concomitant judicial recognition that a pension is not a gift (see pp. 13-14, supra) have undermined the reasoning behind both components of the "no-sale" rationale — the "no value" reasoning with respect to a noncontributory plan and the "no choice" reasoning with respect to a compulsory plan. As to the former, it is no longer realistic to say that the employer's contribution is a gift rather than compensation for services, and that the employee, therefore, provides no "value" for his interest in the pension fund. Similarly as to the latter component, it is not correct to view the employee's voluntary decision to accept or retain a job, and thereby receive an interest in a pension fund, as never being affected by misrepresentations about the pension.

1. The "no value" reasoning

The employer's contribution to a noncontributory pension plan is not a gift, but, rather, is compensation for the employee's labor. And, as has been recognized in cases arising under the antifraud provisions of the federal securities laws, the giving of labor for a security constitutes the giving of value. 55/

We have previously seen (see p. 14, supra) that at one time pensions were legally considered to be mere gratuities given by the employer to his employees, and that this Court, in the Inland Steel decision in

55/ Collins v. Rukin, 342 F. Supp. 1282 (D. Mass., 1972); Securities and Exchange Commission v. Addison, 194 F. Supp. 709 (N.D. Tex., 1961). See also, Hannan & Thomas, "The Importance of Economic Reality and Risk in Defining Federal Securities," 25 Hastings L. Rev. 219, 236 (1974); Long, "An Attempt to Return 'Investment Contracts' to the Mainstream of Securities Regulation," 24 Okla. L. Rev. 135, 161-162 (1971).

1948, signaled the end of this theory by holding that pension funds were a mandatory subject of collective bargaining on the ground that the employee's labor constituted the legal consideration for the pension interest. In the next twenty years, other decisions similarly held that pensions funded through employer contributions were not gratuities, but rather were purchased by employees through their labor; in other words, the employer contributions were considered to be, in the words of the Supreme Court, "really another form of compensation to the employees." Lewis v. Benedict Coal Corp., 361 U.S. 459, 469 (1960). 56/

Whatever doubts about this proposition remained, however, were completely dispelled by the legislative history of federal pension legislation, including ERISA. As early as 1958, a Senate Committee stated:

"Regardless of the form they take, the employer's share of the costs of these plans or the benefits the employer provide is a form of compensation." 57/

In 1961, Arthur Goldberg, then Secretary of Labor, engaged in the following colloquy during testimony before the Congress:

"Mr. Pucinski. Do I understand the situation correctly: A company sets up a pension plan for its workers. This plan is part of the fringe benefits that are given to the worker and therefore may deter him from asking for additional salary in wage negotiations. Then the employer pays into this pension plan a certain amount of money and holds out to his employees that, when they retire and become eligible for benefits under this plan, they will have certain pension benefits available to them. Is this the way this works?

"Secretary Goldberg. There are two ways that this is generally done. Where you have a union, more often than not it is negotiated as part of a collective bargaining arrangement. Very often when it is negotiated in

56/ See also, Employing Plasterers' Assn. of Chicago v. Journeymen Plasterers' Protective and Ben. Soc. of Chicago, 279 F.2d 92, 99 (C.A. 7, 1960); Ball v. Victor Adding Machine Co., 236 F.2d 170, 173 (C.A. 5, 1956); Lucas v. Seagrave Corp., 277 F. Supp. 338 (D. Minn., 1967).

57/ S. Rep. No. 1440, 85th Cong., 2d Sess. 4 (1958).

this way the settlement allocates part of what might otherwise have gone into a wage package which the employee might receive, to the welfare fund for the benefit of the employees. You may have noticed in the papers this morning the negotiation that is taking place right here in the District between some of the building trades unions where the sole request, if I read it accurately, was that a contribution be made into the welfare fund. So that, really in those situations this is really part of what normally would be a wage settlement. That is one way it is done" (emphasis added). 58/

A union representative echoed this belief in 1973. Leonard Woodcock, president of the United Auto Workers, testified:

"UAW members have regularly given a high priority to pension benefits in collective bargaining. Repeatedly, with membership support from all age groups, decisions have been made to direct substantial parts of a potential 'economic package' into pensions."59/

A year earlier, Manuel Cohen, after serving as Chairman of the Commission, testified that an employee acquiring an interest in a pension fund is "investing money" which he has "earned". He added:

"There is no gratuity involved. Realistically, the employee is simply putting into a fund for his future use that which he would otherwise get in his paycheck."60/

Congress, in its consideration of ERISA, indicated its belief that pension benefits are deferred wages. In a review of the extensive ERISA hearings, an interim report by the staff of the Senate Committee on Labor and Public Welfare stated:

"An important theme which emerged from Subcommittee hearings related to the basic dichotomy in the rationale for a pension plan. Repeatedly, witnesses volunteered testimony that they regarded their pension benefits as deferred wages. Since labor negotiations resulting in wage increases through collective bargaining invariably include some consideration of pension

58/ Hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 1st Sess. 27 (1961).

59/ Hearings before the Senate Subcommittee on Private Pension Plans of the Committee on Finance, 93d Cong., 1st Sess. 467 (1973).

60/ Hearings before the Subcommittee on Labor, S. Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 231 (1972).

benefits, employees believe that had pensions not been included in the settlement package, they would have received higher wage commitments." 61/

And Senator Javits, one of the two sponsors of ERISA in the Senate, has stated:

"* * * I believe that the new legislation [ERISA] has settled in an indisputable fashion, the legal status of private pensions. Whatever lingering doubts may have persisted prior to its passage, the law tells us that private pensions are a form of deferred wages and not a form of gratuity to be offered and withdrawn at the whim of the employer. In short, the 'gold watch' theory of pensions is dead once and for all * * *." 62/

The arguments advanced by the defendants to dispute that the employee gives value in a noncontributory plan are without merit. Thus, they assert (IBT Br. 26; Local Br. 27-30) that employer contributions to pension plans are not treated as wages under certain other statutes. But those statutes in no way suggest that these contributions are gifts for which the employees give no value. Similarly irrelevant are defendant IBT's assertions (1) that the union cannot unilaterally determine whether a given amount of employer money will be contributed to the pension fund rather than paid directly as wages and (2) that pension fund contributions may not be directly proportionate to the individual employee's earnings (IBT Br. 26). Notwithstanding these assertions, however, the defendants are unable to dispute that the employer's contributions are part of the total compensation paid in exchange for the employee's labor. IBT itself, at one time, understood quite well this economic reality. In testimony before Congress, Sidney Zagri, legislative counsel of IBT, stated:

"We subscribe to the concept that health and
and welfare and pension funds are for the most

61/ S. Rep. No. 92-634, Interim Report of Activities of the Private Welfare and Pension Plan Study, 1971, 92d Cong., 2d Sess. 75 (1972).

62/ Address by Senator Jacob K. Javits, Briefing Conference on Pensions and Employee Benefits, September 19, 1974.

part deferred wages and, as such, should receive similar protection afforded other funds of a quasi-public nature" (emphasis added). 63/

2. The "no choice" reasoning

As discussed previously, the Commission has taken the position for registration purposes that no sale to the employee occurs in a compulsory pension plan because it was believed that an employee's decision to take or retain a job was never affected by representations about the pension offered. That conclusive presumption of no sale should not now be extended to the anti-fraud provisions; while it may have had some basis in fact when the pension constituted an insignificant portion of the benefits received by the employee, it is no longer valid today when pensions represent a major element of the compensation package.

We have previously discussed the legal recognition, beginning with this Court's landmark decision in Inland Steel, of the importance of pensions to employees. We have also cited testimony before Congress, including that of union representatives, on the importance of pension funds in collective bargaining. It is not surprising, therefore, that it has been recognized that

63/ Hearings before the Special Subcommittee on Labor, House Committee on Education and Labor, 87th Cong., 1st Sess. 225 (1961).

The defendants also rely (IBT Br. 27-28; Local Br. 26) on the recent decision of the Court of Appeals for the Second Circuit in Securities Investor Protection Corp. v. Morgan, Kennedy & Co., 533 F.2d 1314 (1976), where the court held that employee beneficiaries of a profit-sharing trust are not "customers" of the broker-dealer firm with which the trust maintained a brokerage account. The court there held only that the individual beneficiaries of the trust must make their claim against the broker-dealer through the trust, rather than individually. The contrary interpretation rejected by the court would mean, for example, that each of the hundreds or thousands of shareholders in a mutual fund would separately be able to take advantage of the guarantee provisions of the Securities Investor Protection Act, 15 U.S.C. 78aaa, et seq., and thereby each obtain reimbursement from the Securities Investor Protection Corporation up to the maximum amount authorized by that Act to be paid to a single brokerage "customer." We do not see how this determination of the rights under that Act of the trust beneficiaries vis-a-vis the broker-dealer has any relevance to the rights of the beneficiaries vis-a-vis the trust itself.

pensions can be a significant factor in the decision to take or keep a job. Thus, a Senate committee has stated that pensions are important in the attraction of good workers. 64/ Similarly, then Secretary of Labor Arthur Goldberg, in testifying before Congress, observed:

"It is commonplace today when you go into a firm for employment that one of the things you discuss is what type of welfare and pension plan an employer has. That is an essential condition of employment as any employer, I am sure, would tell you testifying before you." 65/

And, James Hodgson, then Secretary of Labor, echoed this comment eleven years later, when he stated to the Senate committee considering the bill which became ERISA:

"Indeed, the variety of plan types is a significant element in the competition among employers for the workforce." 66/

Not only may representations about a pension affect a person's initial decision to take a job, they may also affect him thereafter in his decision whether to retain the job and its accompanying pension or to seek a different job with a different pension. And, in view of the extent of job mobility in this country, this decision whether to change jobs and pensions is a matter of continuing importance. The Bureau of Labor Statistics found that in a period of one year, ten percent of the labor force shifted from one job to another. 67/ Moreover, a majority of the job shifts involved a change to a

64/ See S. Rep. No. 1734, Welfare and Pension Plan Investigation, 84th Cong., 2d Sess. 11-13 (1956).

65/ Hearings before the Special Subcommittee on Labor, House Committee on Education and Labor, 87th Cong., 1st Sess. 32 (1961).

66/ Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 99 (1972).

67/ See Hearings before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 90th Cong., 2d Sess. 249-254 (1968).

different industry. Thus, it is likely that an employee will be faced with a number of employment decisions in his lifetime and, as he gets older, such shifts will be more and more affected by the pension plan offered by the employer.

Accordingly, an employee may be faced with a meaningful decision, even in the case of a compulsory plan, whether to acquire an interest in the pension fund. And, this voluntary decision is sufficient to satisfy the "sale" requirement under the antifraud provisions of the securities laws. Indeed, cases have held, under the antifraud provisions, that a "sale" occurs in a variety of situations where there is no voluntary action by the alleged "purchaser." 68/ Here there is even a stronger case for finding a sale,

68/ For example, in Vine v. Beneficial Finance Co., 374 F.2d 627 (1967), the Court of Appeals for the Second Circuit held that a shareholder who had no control over whether his corporation was merged into another corporation was an "involuntary" seller of the stock of his corporation. In Zeller v. Bogue Manufacturing Corp., 476 F.2d 795 (1973), that same court held that a subsidiary which had been compelled by its parent to issue certain securities was a "seller" of securities, stating (id. at 800):

"The [Securities Exchange] Act is for the protection of investors, and its provisions must be read accordingly
* * * . [W]e see no reason to doubt that [the subsidiary] stood in the position of an investor, although perhaps an involuntary one, with respect to [the parent]" (footnotes omitted).

Similarly, in International Controls Corp. v. Vesco, 490 F.2d 1334, certiorari denied, 417 U.S. 932 (1974), that court held that a dividend consisting of stock in a corporate spin-off was a "sale" of the stock even though the receiving shareholders had no control over the issuance of the dividend and gave no consideration for it. The court reasoned (id. at 1345):

"[I]t is a transaction involving, as it unquestionably does, the disposition of securities and, therefore, one for which the corporation is well deserving of and entitled to the protection of §10b."

See also, Coffee v. Permian Corp., 434 F.2d 383 (C.A. 5, 1960) (liquidation of a corporation); Dudley v. Southeastern Factor and Finance Corp., 446 F.2d 303 (C.A. 5, 1971) (liquidation of a corporation); Feldberg v. O'Connell, 338 F. Supp. 744 (D. Mass., 1972) (dissolution of a partnership); Jefferies & Co., Inc. v. Arkus-Duntov, 357 F. Supp. 1206 (S.D. N.Y., 1973) (where a broker must retain possession of stock because his customer refused to accept rescission by the buyer).

since the employee does take voluntary action (obtaining employment and thereafter performing labor for his employer) which results in his giving value for a security.

This conclusion is in accord with the only other reported decision we have found discussing the question whether the acquisition of a security pursuant to an employment contract constitutes a sale under the antifraud provisions. In Collins v. Rukin, 342 F. Supp. 1282 (D. Mass, 1972), the plaintiff was induced to enter into employment by a promise of a salary and certain fringe benefits, including a stock option. The plaintiff, alleging that the defendant-employer had made misrepresentations during the course of employment negotiations, sought damages under the antifraud provisions of the securities laws. The defendants argued that the antifraud provisions should not apply to a security which is "incident to and part and parcel of an employment contract for personal services" (id. at 1286). The defendants asserted that, "certainly, Section 10 of the 1934 Act and Rule 10b-5 promulgated by the Commission thereunder were not intended to create a federal right for alleged misrepresentations in private employment negotiations" (id. at 1286-1287). The court responded (id. at 1287-1288):

"No compelling reason has been suggested to this Court why one who, in the interest of promoting his company and employing the most talented people in a particular field, engaged in fraudulent practices in connection with the offer or sale of securities should enjoy any greater freedom from the operation of the federal securities laws than one who perpetrates a fraud without promotional or employment motive."

Further, in response to the defendants' argument that no "sale" was involved because of the employment context, the court stated (id. at 1289):

"The broad design of the federal securities laws should not be frustrated by restrictive application of the purchase-sale requirement."

In arguing in this case that the acquisition of a pension interest in a compulsory plan does not involve a sale, the defendants and the Secretary of Labor dispute the district court's conclusion that the vote to ratify the collective bargaining agreement constitutes the voluntary action which gives rise to a sale. They contend that that conclusion is contrary to a basic characteristic of collective bargaining that the individual employee relinquishes his right to bargain to his union (IBT Br. 23-25; Local Br. 12-15, 31; Labor Br. 9-13). But, entirely apart from the ratification vote, and even in situations where no ratification vote is taken, we have shown that the employee's decision to take or retain the job, and thereafter perform labor for a "package" of compensation and benefits, constitutes voluntary action resulting in a sale. ^{69/} And, as the Secretary of Labor points out in his amicus brief (Labor Br. 2-3, n. 1):

"Individual decisions to take or leave employment are not governed by labor law, and are not central to the bargaining process that is of major concern to the Secretary."

In any event, there is no inconsistency between collective bargaining principles and the conclusion that the ratification vote involves a sale. Although the majority's decision in the ratification vote overrides any individual employee's own choice, the majority's decision is made up of separate

^{69/} With respect to an employee's decision to remain in a job, defendant IBT contends (IBT Br. 23) that, under Blue Chip Stamps v. Manor Drug Stores, supra, this decision by the employee cannot involve a sale. IBT correctly describes (IBT Br. 22) Blue Chip as holding "that private damage actions under Rule 10b-5 are limited to actual purchasers and sellers," thereby excluding relief in favor of "offerees dissuaded from buying" and "stockholders persuaded to retain their stock * * *." IBT, however, erroneously equates an employee's decision to retain his job with a stockholder's decision to retain his stock. The latter decision results in the stockholder's giving no value and acquiring nothing; he merely keeps what he already owns. By contrast, the employee who decides to retain his job makes a decision which results in his continuing to give value in the future and his further acquisition of an interest in the pension fund.

individual decisions. These individual decisions, and consequently the group's decision, can be affected by misrepresentations concerning the pension. 70/

* * *

In sum, the reasoning behind the "no-sale" rationale has been undermined by the evolution of the economic significance and legal understanding of pensions. Accordingly, we believe that, even if that reasoning had once been valid for purposes of registration, it should not now be used to preclude the applicability of the antifraud provisions. 71/

C. Recovery Under the Antifraud Provisions Should Be Permitted Where an Employee's Action Was Materially Influenced by Fraudulent Representations Concerning the Pension.

As we have stated (see p. 45, supra), our objection to the "no choice" reasoning behind the "no-sale" rationale is that it rests on the unrealistic assumption that a decision to take or keep a job can never be affected by

70/ This situation is analogous to the corporate merger situation, where a vote by the shareholders to merge is binding notwithstanding any individual shareholder's vote to the contrary. It was this circumstance upon which the Commission's former "no-sale" rule (see p. 38, supra) was based. In rescinding that rule, the Commission characterized that basis as "only correct in a formalistic sense" in that it "overlooks the reality of the transaction." Rather, the Commission pointed out, the "group decision is not some type of independent fiat, but is only the aggregate effect of the voluntary decisions made by the individual stockholders * * *." 37 Fed. Reg. 23631, 23632 (Nov. 7, 1972).

71/ This position does not represent any departure by the Commission from its prior reliance on the "no-sale" rationale, since the Commission applied it only in the context of Securities Act registration. In any event, it is well settled that

"administrative authorities must be permitted, consistently with the obligation of due process, to adapt their rules and policies to the demands of changing circumstances."

Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968). Cf., American Trucking Associations, Inc. v. United States, 344 U.S. 298, 313-314 (1953); Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 228 (1946); Shawmut Association v. Securities and Exchange Commission, 146 F. 2d 791, 796-797 (C.A. 1, 1945).

the pension plan. Thus, this reasoning creates a conclusive presumption that the employee's decision is not so affected, thereby denying relief not only to the employee whose decision was in fact not influenced by the pension, but also to the employee whose decision was so influenced. In urging that an employee's decision to accept or retain a job constitutes a sale for purposes of the antifraud provisions, we are not arguing that he should be permitted, ipso facto, to recover damages under those provisions. Our position, rather, is that, consistent with general principles of causation, 72/ recovery should be permitted where the employee's decision was materially influenced by fraudulent representations about the pension. An employee who acquires an interest in a compulsory pension plan will, as a practical matter, encounter some difficulty in establishing the requisite causation. 73/ But, that should not mean that such an employee should be deprived of an opportunity to prove the necessary elements of his claim.

The inappropriateness of a conclusion that there is no sale as a matter of law, by conclusively presuming that material misrepresentations had no effect on a plaintiff, was recently recognized by the Court of

72/ See e.g., List v. Fashion Park, Inc., 340 F.2d 457, 462 (C.A. 2), certiorari denied, 382 U.S. 811 (1965).

73/ Similarly, the fact that the interest in the pension is sometimes offered in the collective bargaining milieu and is subject to the disclosure requirements of ERISA may have some bearing on the materiality of alleged false or misleading statements, since there is no "specific rule" as to what facts are material and that determination must be made "on a case-by-case basis according to the fact pattern of each transaction." Securities and Exchange Commission v. Shapiro, 494 F. 2d 1301, 1306 (C.A. 2, 1974). See also, Radiation Dynamics, Inc. v. Goldmuntz, 464 F. 2d 876, 888 (C.A. 2, 1972); Securities and Exchange Commission v. Texas Gulf Sulphur, 401 F. 2d 833, 848 (C.A. 2, 1968).

Appeals for the Fifth Circuit in Spector v. L Q Motor Inns, Inc., 517 F.2d 278 (1975). The plaintiff there had executed a property settlement with his wife pursuant to which he received a number of shares in a corporation controlled by members of his wife's family. Contemporaneous with this settlement, he sold those shares back to the corporation. He alleged, however, that the corporation had failed to disclose certain material information about plans for a public offering of the company's stock in violation of the antifraud provisions. The defendants in that case argued that no "sale" of the securities had occurred because the transaction should be viewed as merely that part of the divorce settlement by which the plaintiff liquidated his community property claims, and that the plaintiff therefore was not really making an investment decision. The district court agreed and dismissed the action.

The court of appeals reversed and remanded. The primary ground for the court's reversal was that it would be inappropriate to dismiss the claim without consideration of all the surrounding circumstances, including "questions of intent, reliance and motive * * * ." Id. at 284. As the court concluded (id. at 285-286):

"If [the plaintiff] viewed his interest in the 18 shares as merely that of a pay-out conduit, as defendants argue, [the corporation's] future plans for financing would be of no concern to him. However, at this stage in the case we have no idea what the facts were. Thus, to dismiss the exchange of stock as merely part of an 'indivisible' divorce settlement not cognizable under 10b-5 was premature.

* * *

"[The plaintiff] must still prove his federal claim. We hold only that plaintiff must be given a chance to do so * * * ."

Thus, the court of appeals, in rejecting an argument that as a matter of law there was no sale, refused to countenance a conclusive presumption that,

because the plaintiff's actions were taken in the context of a divorce settlement, he could not have been influenced by the alleged fraudulent representations concerning the security. Similarly here, relief should not be denied on the basis of a conclusive presumption that, where an employee's acquisition of a security occurs as a result of his decision to take or retain a job, that acquisition is not affected by misrepresentations concerning the security. Relief should instead depend upon the actual circumstances and proof.

* * *

To summarize our position, the issue on this appeal is but the threshold question of whether the antifraud provisions are applicable to the acquisition of an interest in a pension fund. That question turns on whether such an acquisition involves a "sale" of a "security". A conclusion that it does, however, is not determinative of a particular employee's ultimate right to relief, but, rather, means only that he will be given an opportunity to prove his case. His right to recover damages under the antifraud provisions depends, in the final analysis, on whether he made an investment decision. The necessity for an investment decision is part of the causation requirement applicable in private damage actions and is therefore dependent upon the proof offered in any particular case. Accordingly, the Commission's position that an acquisition of an interest in a pension fund does involve a sale of a security does not mean that the plaintiff here made an investment decision. That determination must await the development of the particular facts. We urge only that he be given the opportunity to develop those facts.

III. RECOVERY UNDER THE ANTIFRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS FOR FRAUD OCCURRING IN THE SALE OF INTERESTS IN A PENSION FUND IS NEITHER DUPLICATIVE OF NOR INCONSISTENT WITH NATIONAL LABOR LAW OR POLICY.

Contrary to the contention of the defendants and the amici that the applicability of the antifraud provisions is somehow precluded by national labor law and policy, Congress has enacted no express preemption of the securities laws, and the defendants and amici have failed to meet the heavy burden of demonstrating an implied preemption.

Not only does ERISA contain no provision expressly ousting the applicability of the antifraud provisions, but, on the contrary, Congress in ERISA expressly preserved all other federal law. Thus, in 1974, Congress, only four years after specifically considering the status of interests in pension funds under the federal securities laws in the 1970 amendments discussed previously and deciding to leave them subject to the antifraud provisions (see p. 30, supra), provided in Section 514(d) of ERISA, 29 U.S.C. 1144(d):

"Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States * * * or any rule or regulation issued under any such law."

By contrast, Congress in ERISA did specifically preempt all state laws, but with the following significant exception (Section 514(b)(2)(A)):

"Nothing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities" (emphasis added).

The statutory scheme of state securities laws is generally similar to the federal scheme; they exempt pension interests from registration but not from antifraud provisions. ^{74/} Congress could hardly have believed that the antifraud standard of the federal securities laws would be disruptive and, therefore, should be ousted, while at the same time it preserved the numerous antifraud laws of the various states.

^{74/} See, e.g., Ill. Rev. Stat. Ch. 121-1/2, Section 137.21; D.C. Code Sec. 2-2401(e)(5); N.Y. Gen. Bus. Law Sec. 359-j(2)(e) (McKinney 1962); 7 Uniform Laws Ann., Uniform Sec. Act Sec. 402(a)(11) (1970).

It is not surprising, therefore, that the only other court of which we are aware that has considered the question of whether ERISA overrides the federal securities laws has concluded that it does not. 75/

Notwithstanding the absence of an express preemption of the federal securities laws antifraud provisions, the defendants and amici, by contending that the application of those provisions would be duplicative of and inconsistent with national labor law and policy, are arguing, in effect, for an implied preemption. However, in view of ERISA's express preservation of all other federal law, any assertion of implied repeal is without merit for that reason alone. Furthermore, the defendants and amici have failed to satisfy the exacting standard which the Supreme Court has set for establishing an implied repeal stemming from an inconsistency between two federal statutory schemes. In Gordon v. New York Stock Exchange, 422 U.S. 659 (1975), the Court concluded that an implied repeal of the antitrust laws resulted from an inconsistency between those laws and provisions of the federal securities laws. The Court emphasized in its opinion, however, that implied repeal "is not favored and not casually to be allowed," that it may be found only where there is a "plain repugnancy" between the statutory schemes, and that repeal may be "implied only if necessary to make the * * * [statute] work, and even then only to the minimum extent necessary." Id. at 682-683. 76/

That repeal of the antifraud provisions of the federal securities laws is not lightly to be inferred is demonstrated by the Supreme Court's decision in Securities and Exchange Commission v. National Securities, Inc., supra, 393 U.S. 453. In

75/ Securities and Exchange Commission v. Garfinkle, ['74-'75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,020 (S.D.N.Y., 1975).

76/ In stating these criteria, the Court relied on its earlier decision in Silver v. New York Stock Exchange, 373 U.S. 341 (1963), where the Court had concluded that there was no implied repeal of the antitrust laws by the securities laws in the context there involved.

that case, the Court held that a federal district court, in an action brought by the Commission under Section 10(b) of the Securities Exchange Act and Rule 10b-5, had authority to "unwind" a merger between two insurance companies which had been approved by the Arizona Director of Insurance under state insurance laws. The Court authorized this remedy for a violation of the antifraud provisions, notwithstanding a provision of the McCarran-Ferguson Act, 15 U.S.C. 1012(b) (see note 22, supra), that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * ."

Here the defendants and amici have failed to satisfy the applicable criteria for implied repeal. First of all, their claim that the antifraud provisions would be duplicative of ERISA, even if true, would not justify an implied repeal of the antifraud provisions, since the mere existence of duplicative regulation does not constitute the "repugnancy" required for such repeal.

In any event, the antifraud provisions are not duplicative of ERISA. Although certain of the defendants and amici point to the requirements in ERISA that the employee be furnished a summary description of the pension (29 U.S.C. 1022(a)) and annual summaries of financial information (29 U.S.C. 1024(b)) (IBT Br. 38; Labor Br. 29-33; NCCMP Br. 28-29), these requirements are no substitute for the protections afforded by the antifraud provisions. Vitally significant in this regard is the fact that the cited requirements of ERISA provide no relief where false or misleading representations are made either orally, or in written materials other than the documents required by ERISA. 76/ For example, if an employer induces

76/ Section 502(a) of ERISA, 29 U.S.C. 1132(a) provides a right of action for a pension fund beneficiary "to obtain * * * appropriate equitable relief * * * to redress * * * violations" of any provision of Title I of ERISA (Title I contains the labor law provisions of ERISA). However, there is no provision of Title I which generally prohibits the making of false or misleading representations to an employee concerning the pension fund.

a person to accept employment, and thereby acquire an interest in a pension fund, through a promise of what he knows to be completely illusory pension benefits, that person would appear to have no remedy under ERISA. Of course, the antifraud provisions would provide a remedy. Accordingly, the need for the protection of the antifraud provisions in the pension fund area is no less than the need for such protections even where the Securities Act's registration provisions apply; and Congress has so recognized by making the antifraud provisions applicable regardless of the availability of the written disclosure document required by the registration provisions. 77/

Likewise without merit is the claim that there is an inconsistency between the antifraud provisions and national labor law and policy. In this regard the defendants and amici raise the specter that disastrous consequences would flow from a decision holding the antifraud provisions to be applicable here. Thus, they assert that "[t]he district court's ruling destroys [national labor] policy" (Local Br. 41); that "national labor policy will become a sham" (Local Br. 18); that "[n]othing could be more disruptive of stable labor-management relations and the free flow of commerce" (ERIC Br. 34); and, in a final burst of hyperbole, that "retirement plans would be bankrupted giving rise to claims by the 5,000,000 employees with vested benefits, for a total liability of 300 billion dollars (\$300,000,000,000) or twenty percent (20%) of the nation's Gross National Product in 1975 * * * and twice (200%) the total assets of the nation's private retirement plans," thereby "destroy[ing] the American private retirement plan system" (ERIC Br. 34). 78/

77/ See Sections 3(a) (opening "except" clause), 4 (opening reference to the registration provisions of Section 5), and 17(c) of the Securities Act, 15 U.S.C. 77c(a), 77d and 77q(a).

78/ Certain of the defendants and amici rely on the Supreme Court's decision in Blue Chip in support of their argument that this Court should hold the antifraud provisions inapplicable in order to avoid

With all respect to the defendants and amici, we do not see how a prohibition against fraud would lead to such disastrous consequences. While we are sympathetic to their desire to avoid a conflict between the federal securities laws and national labor law and policy, we believe that the application of the antifraud provisions will create no such conflict. As we noted early in this brief (see p. 4, supra), the arguments advanced by the defendants and amici appear to be based upon a confusion between the requirements of the antifraud provisions and the requirements of the Securities Act's registration provisions. Thus, it is contended that application of the antifraud provisions would "confuse and disrupt the collective bargaining process" in that "formulating appropriate disclosure would be cumbersome and time-consuming" (IBT Br. 41, 42); that it would be necessary to prepare "detailed but masterfully simplified explanations" of the pension plan (Labor Br. 18); and that application of the antifraud provisions would result in "[i]mposing * * * a new massive bureaucracy * * *" (NCCMP Br. 27). The antifraud provisions, as we have already shown, are only a prohibition upon fraudulent conduct, including the making of false or misleading representations. If a person chooses to make a representation which is rendered misleading by the failure to disclose other facts, he is obligated to make further disclosures. But, the antifraud provisions do not constitute a general requirement of detailed affirmative disclosure, either oral or written. Nor do they require that documents be filed with and processed by the Commission. And in those instances where the Commission

78/ (footnote continued)

the possibility of costly and vexatious litigation (IBT Br. 43-44; Local Br. 19; ERIC Br. 31-32). But, under that reasoning, whenever a question is presented as to the applicability of the antifraud provisions, a court would be compelled to rule against their applicability. That this result was not intended by the Supreme Court in Blue Chip is apparent from the nature of the issue presented in that case. The Court there was dealing only with the question of the plaintiff's standing to maintain the action and not with the separate question of whether the antifraud provisions applied to the defendant's conduct.

seeks to enforce the antifraud provisions, such enforcement is not by administrative proceedings before the Commission but rather through civil actions brought by the Commission in federal district courts. 79/

The registration provisions, by contrast, do establish a system for detailed affirmative disclosure. They require the preparation and filing with the Commission of disclosure documents which are processed and reviewed by the Commission's staff, and they are enforced, in part, through administrative "stop-order" proceedings. 80/ While the registration provisions thus do impose the type of requirements which the defendants and amici mistakenly attribute to the antifraud provisions, the position we are urging here would not result in the applicability of the registration provisions. As we have indicated (see p. 38, supra), rejection of the "no-sale" rationale for antifraud purposes does not require its rejection for purposes of registration. And, in any event, the 1970 amendments to the securities laws (see p. 30, supra) specifically exempted the sale of interests in nearly all pension plans from the registration provisions. 81/

Furthermore, insofar as the Commission is urging that a sale occurs when the employee decides to take or keep a job (as opposed to the sale which occurs when there is a ratification vote), the claimed disruption of the collective bargaining process is irrelevant. As noted earlier (see p. 49, supra), the Secretary of Labor

79/ See Section 20(b) of the Securities Act, 15 U.S.C. 77t(b), and Section 21(d) of the Securities Exchange Act, 15 U.S.C. 78u(d).

80/ See Sections 6, 7, 8 and 10 of the Securities Act and Schedule A of that Act, 15 U.S.C. 77f, 77g, 77h, 77j, 77aa.

81/ There is only one affirmative condition -- qualification under Section 401 of the Internal Revenue Code -- that a pension plan must meet in order to qualify for this exemption. It has been estimated that 96% of pension plans satisfy this condition. See, S. Rep. No. 92-1150, 92d Cong., 2d Sess. 110 (1972). There is also a negative condition; the exemption is lost if the plan invests an amount greater than the employer's contributions in securities of the employer (see p. 33, supra).

acknowledges (Labor Br. 2-3, n. 1): "Individual decisions to take or leave employment are not governed by labor law, and are not central to the bargaining process that is of major concern to the Secretary." Thus, to a considerable extent, there does not really seem to be disagreement between the position urged by the Commission and the views of the Secretary of Labor.

Certain of the defendants and amici also assert that application of the antifraud provisions in this case would be contrary to the specific provision of ERISA that an employee may not be given vesting credit for years of service before the effective date of ERISA if the employee would not have been entitled to the credit under the pension plan which covered him prior to the enactment of ERISA. Since the plaintiff here was covered by a pension plan which existed prior to the enactment of ERISA, it is argued that application of the antifraud provisions would give him a remedy which Congress specifically decided should be withheld from him (IBT Br. 42-43; Labor Br. 24-26; ERIC Br. 22, n. 15; NCCMP Br. 32-33).

Such an inconsistency between ERISA and the measure of damages sought by the plaintiff in this case, even if it did exist, has no bearing either on the plaintiff's right to obtain recovery based on a different measure of damages, or on the separate question of the applicability of the antifraud provisions in this and other cases. False and misleading representations could be made concerning many aspects of a pension plan, and the remedies sought under the antifraud provisions in those situations would not in any way be inconsistent with ERISA. If the remedy sought by the plaintiff here is inconsistent with ERISA, the district court, at an appropriate later stage of the litigation, can fashion the relief to avoid any conflict. See Tcherepnin v. Knight, supra, 389 U.S. at 346, where the defendants, in arguing

that withdrawable capital shares of a savings and loan association were not securities, contended that the plaintiffs, if successful in their rescission action under Rule 10b-5, would gain an unfair advantage over other investors in the association, which was in liquidation. The Court responded (id.):

"This argument, at best, is a non sequitur. This case in its present posture involves no issue of priority of claims against City Savings. This case involves the threshold question of whether a federal court has jurisdiction over the complaint filed by the petitioners -- a question which turns on our construction of the term 'security' as defined by §3(a)(10) of the Securities Exchange Act of 1934. It is totally irrelevant to that narrow question of statutory construction that these petitioners, if they are successful in their federal suit, might have rights in the limited assets of City Savings superior to those of other investors in that Association."

CONCLUSION

For the foregoing reasons, the Securities and Exchange Commission urges that this Court hold that the district court properly denied the motion to dismiss the securities law counts of the complaint, thereby affording the plaintiff-appellee an opportunity to prove his case.

Respectfully submitted,

HARVEY L. PITT
General Counsel

PAUL GONSON
Associate General Counsel

JACOB H. STILLMAN
Assistant General Counsel

EDWARD A. SCALLET
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

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